NATTHANAN YOOCHOMSUK & ANOR
v. INSP MOHD NOOR HUSRI JOHARI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
SU TIANG JOO J
[CIVIL SUIT NO: WA-21NCvC-15-02-2020]
29 JULY 2024

Abstract – *(i) A Government official who is guilty of a constitutional tort shall not be entitled to the immunity against personal liability housed in s. 33(4) of the Government Proceedings Act 1956. Such immunity is only available to a personal individual who acted in good faith or purported to act in good faith; (ii) The court may order successful claimants in a case premised on constitutional tort, to first secure satisfaction of the judgment debt in whole or in part from the primary tortfeasor before seeking to secure satisfaction of the balance judgment debt in whole or in part from the other judgment debtors; (iii) It would offend the reasonable man's sense of justice if he has to contribute towards the satisfaction of the judgment obtained against a Government official, ie, a police officer, who had broken the law by beating a member of the public whom he was to protect and who later died due to being denied medical treatment.*

TORT: *Damages – Claim – Death of detainee in police custody – Detainee arrested by police and beaten up during detention – Detainee brought to Magistrate's Court for remand – Magistrate dismissed remand application and directed that detainee be brought to hospital for medical treatment – Police did not bring detainee to hospital – Detainee re-arrested and continued to be detained without given medical treatment – Detainee died in custody – Members of police force found liable for negligence, assault and battery, breach of statutory duties and false imprisonment – Assessment of damages*

ADMINISTRATIVE LAW: *Public officer – Immunity – Constitutional tort – Death of detainee in police custody – Members of police force found liable for negligence, assault and battery, breach of statutory duties and false imprisonment – Primary tortfeasor beat detainee up and denied him medical attention – Whether primary tortfeasor personally liable – Whether immunised from having to individually make payment – Whether public officer acting or purporting to act in good faith – Government Proceedings Act 1956, ss. 3 & 5*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to life – Constitutional tort – Death of detainee in police custody – Federal Constitution, art. 5*

A ***DAMAGES:*** *Assessment – Special, general, exemplary and aggravated damages – Detainee arrested by police and beaten up during detention – Detainee brought to Magistrates' Court for remand – Magistrate dismissed remand application and directed that detainee be brought to hospital for medical treatment – Police did not bring detainee to hospital – Detainee re-arrested and continued to be detained* B *without given medical treatment – Detainee died in custody – Members of police force found liable for negligence, assault and battery, breach of statutory duties and false imprisonment – Amount of damages ought to be awarded*

CIVIL PROCEDURE: *Judgments and orders – Judgment debt – Satisfaction – Death of detainee in police custody – Members of police force found liable for* C *negligence, assault and battery, breach of statutory duties and false imprisonment – Primary tortfeasor deprived detainee of life by beating him up and denying him prompt medical attention despite Magistrate's order – Satisfaction of judgment in whole or in part by primary tortfeasor before satisfaction of balance judgment debt is secured in whole or in part from other judgment debtors*

D This was a case of a detainee, Balamurugan M Suppiah ('Balamurugan'), who died whilst in the custody of the police. The first plaintiff, a Thai national and one of two co-administrators of the estate of Balamurugan, claimed to be the lawful wife and dependant of Balamurugan. The second plaintiff was the younger brother of Balamurugan and the other co-administrator. The first E to fifth defendants were members of the police force whilst the sixth defendant was the Government of Malaysia. Balamurugan was arrested by the police from Balai Polis Bandar Baru Klang. On 7 February 2017, Balamurugan was brought to the Magistrate's Court for remand. During the remand proceedings, the Magistrate was informed by Balamurugan's lawyer F that Balamurugan was beaten up whilst in custody and appeared to be unwell and weak. Consequently, the Magistrate dismissed the remand application and directed that Balamurugan be brought to the hospital for treatment ('Magistrate's order'). However, in defiance of the Magistrate's order, the police did not bring Balamurugan to the hospital. Instead, the police brought G him to the North Klang District Police Headquarters and did not provide any medical treatment to him. Balamurugan was re-arrested and further detained. Later, on the same day, *ie*, 7 February 2017, Balamurugan was found unconscious, and a medical officer was called. Balamurugan was pronounced dead the next day. Two post-mortems carried out confirmed that the cause of death of Balamurugan was coronary disease with multiple blunt force H trauma, which caused 20 injuries, and that the injuries found on Balamurugan were not accidental or self-inflicted. A public hearing was later conducted by the Enforcement Agency Integrity Commission regarding the death of Balamurugan and the police force was found responsible for causing his death. The first plaintiff brought a dependency claim in the High Court, I under s. 7 of the Civil Law Act 1956 ('CLA'), for herself and their child, who was also a Thai national. In the same action, the first plaintiff brought a claim on behalf of the estate of Balamurugan under s. 8 of the CLA. After

a trial on liability, the High Court Judge ('HCJ') entered judgment against the defendants for liability with damages to be assessed. The Court of Appeal allowed the appeal on liability in part, by rejecting the dependency claim of the alleged wife and child under s. 7 of the CLA, on the grounds that the wife failed to prove that she was lawfully married to Balamurugan, and that the child was the lawful child of both her and Balamurugan. Nevertheless, the Court of Appeal upheld the judgment on the claim by the estate of the Balamurugan under s. 8 of the CLA and remitted the matter back to the High Court for assessment. The plaintiffs sought special, general, exemplary and aggravated damages. The defendants raised a preliminary objection that the plaintiffs failed to call their witnesses to prove the special damages claimed for funeral expenses of RM15,000 and legal charges of RM7,000 for obtaining the letters of administration.

Held (ordering defendants to jointly and severally pay plaintiffs special, general and aggravated damages with costs and interests):

(1) The preliminary objection was without merit because, during the case management for directions for assessment of damages, no objections were raised by the defendants when the plaintiffs sought for the assessment to be conducted by way of evidence being led in the form of affidavits. The defendants also had no objections to the late filing of the affidavit in reply by the plaintiffs. Further, the defendants could have applied to cross-examine the deponent of the two affidavits filed by the plaintiffs but they did not. (para 43)

(2) The invoice showing that RM15,000 had been incurred for Balamurugan's funeral expenses was accepted. The claim of RM1,000 for medical bills for the costs of two post-mortem reports, evidenced by two receipts of RM500 each issued by the Jabatan Perubatan Forensik was agreed by the defendants and was allowed. A further sum of RM7,000 incurred by the plaintiffs to obtain letters of administration of the estate of the deceased was claimed. This expenditure, according to the plaintiffs, was to confer upon the plaintiffs the necessary *locus standi* to sue. It is expressly provided under s. 7(8) of the CLA that a dependency claim could be pursued if there is no executor appointed after six months from the date of the deceased by the persons entitled to claim, that is the dependents. However, this exception is not provided in a claim by the estate of the deceased. Thus, as this action was for both a dependency and estate claim, it was proper and correct for the plaintiffs to apply for letters of administration for purposes of initiating the action. However, instead of claiming it as an item of special damages, this item could be claimed under disbursements reasonably incurred for purposes of bringing the action and should rightfully come to be determined together with the item of costs. As there was a fee note by a firm of solicitors issued for RM7,000, the sum of RM7,000 was

awarded. It was, however, awarded as part of the disbursements reasonably incurred over and on top of costs rather than as special damages. (paras 54-58)

(3) Given the factual matrix of the case and taking into account the post-mortem report on the injuries, Balamurugan suffered at the hands of the police, in particular, the second defendant, a sum of RM100,000 would serve as an adequate compensation for the pain (including mental distress) and sufferings suffered by him. (para 66)

(4) The assessment of damages was for a judgment for an estate claim. This court was bound by the decision of the Federal Court in *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* and by reason thereto, the claim by the plaintiffs as co-administrators of the estate of the deceased for exemplary damages was disallowed. (para 71)

(5) The plaintiffs sought a sum of RM100,000 for aggravated damages. The severe beatings that Balamurugan was subjected to was to try to illegally extract a confession from him. Despite Balamurugan having sought and obtained the empathy and compassion of the Magistrate who refused a remand order and directed the police to bring him for medical treatment, the defendants thumbed their noses at the Magistrate's order. Instead, they sought to disguise their defiance by saying that there was a re-arrest which was wholly disingenuous and did not deal with the issue of the poor medical condition Balamurugan was in. The suffering of Balamurugan was at the hands of the police officers who had abused their powers which were meant to protect life, a right which is so fundamental that it is housed in the Federal Constitution ('FC') under Part II on Fundamental Liberties and, in particular, art. 5. Given the findings of the HCJ, an award of aggravated damages in the sum of RM200,000, which was double from what was sought by the plaintiffs, was awarded. (paras 72, 74 & 77)

(6) Regarding the costs for the assessment of damages, the plaintiffs asked for RM50,000 whereas the defendants offered RM10,000. The HCJ had awarded costs of RM40,000 for the trial on liability which took up three days with seven witnesses called. The hearing for the assessment took only less than one day. A sum of RM15,000 was awarded as costs for the assessment proceedings plus a sum of RM7,000 as disbursements for purposes of obtaining the letters of administration of the estate of the deceased. As the defendants were principally from the Government agency of the police force with the Government of Malaysia being held vicariously liable, there would be no allocatur fee on the costs payable. (paras 79 & 80)

(7) To underscore the abhorrence of the court against the wrongdoing of the second defendant who had abused his powers to detain and interrogate those suspected of committing criminal offences, a further order was made that the plaintiffs were to first seek to secure satisfaction of the judgment debt in whole or in part from the primary tortfeasor (the second defendant) before seeking to secure satisfaction of the balance judgment debt in whole or in part from any of the other judgment debtors, including the sixth defendant, *ie*, the Government of Malaysia. The further order would serve as a more just and effective deterrent to prevent the repeat of such brutal acts being perpetrated in breach of the fundamental constitutional right to life by those thinking that any personal liability of theirs would be paid for by the Government. (paras 84-85 & 121)

(8) Section 33 of the Government Proceedings Act 1956 ('GPA') contains provisions for 'Satisfaction of orders against the Government'. Section 33(4) of the GPA has a provision on the prohibition against execution save by way of first securing a certificate for payment, pursuant to s. 33(1) of the GPA. This prohibition is applicable only if execution is sought to be enforced against the Government. However, s. 33(4) of the GPA has the words 'and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such', which suggests that it immunises the persons who are found liable from having to individually make payment. The tort committed by the second defendant was not a mere tort of negligence. It was a constitutional tort. He deprived the life of the deceased by beating him up and the deceased was denied prompt medical attention despite a directive from the Magistrate to do so. In such a circumstance, for the primary tortfeasor (the second defendant), to be immunised from personal liability to make payment would severely negate the sanctity of the fundamental liberty provision of art. 5 of the FC. The immunity provision in s. 33(4) of the GPA could only be enjoyed by a public officer if he was acting or purporting to act in good faith as prescribed under s. 5 of the GPA. Subjecting the deceased to beatings whilst he was under detention, resulting in 20 marks of personal injuries collectively found on his body by the two pathologists and which led to his death, surely could not be done or purporting to be done in good faith. In the circumstances, the second defendant did not qualify to enjoy the immunity in s. 33(4) of the GPA. Further, to allow the second defendant, in his capacity as a police officer, an immunity, would be a travesty of justice and a violation of the fundamental liberty of equality housed in art. 8 of the FC. (paras 90-93 & 114)

Case(s) referred to:

Azilah Hadri & Anor v. PP [2013] 7 CLJ 577 CA ***(refd)***

CIMB Islamic Trustee Bhd v. Pendaftar Hakmilik Negeri Selangor & Ors [2022] 4 CLJ 499 CA ***(refd)***

Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Hartalega Sdn Bhd & Anor v. Kerajaan Negeri Selangor & Ors [2022] 7 CLJ 735 HC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(dist)***

Hj Wan Habib Syed Mahmud & Anor v. The State Government Of Sarawak [2007] 4 CLJ 832 HC ***(refd)***

Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Jameson And Another v. Central Electricity Generating Board (Babcock Energy, Third Party) [1999] 1 All ER 193 ***(refd)***

Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors [2021] 10 CLJ 915 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(foll)***

Lim Peng Khoon v. Tea Chun Hia & Ors [2023] CLJU 722; [2023] 1 LNS 722 HC ***(refd)***

Lucknow Development Authority v. MK Gupta AIR 1994 Supreme Court 787 ***(refd)***

Marry Mariay Susay (Sebagai Pentadbir Sah Estet Serta Tanggungan Dharmendran Narayasamay v. Insp Hare Krishnan Subramaniam & Ors (Guaman Sivil No. WA-21NCvC-44-05-2016) (Unreported) ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

N Indra Nallathamby v. Datuk Seri Khalid Abu Bakar & Ors [2013] 6 CLJ 272 HC ***(refd)***

Norizan Salleh v. Mohd Firdaus, Ketua Polis Daerah Sentul & Ors (Guaman Sivil No: 21NCvC-227-10-2012) (Unreported) ***(refd)***

Pacific Bunkers Pte Ltd v. Owners Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" & Another Case (No 2) [2015] 7 CLJ 1071 HC ***(refd)***

Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals [2016] 1 CLJ 911 CA ***(refd)***

Pendaftar Hakmilik Negeri Selangor & Ors v. Shaifulizam Mohd Saleh & Anor And Another Appeal [2020] 5 CLJ 595 CA ***(refd)***

Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi [1997] 2 CLJ 409 CA ***(refd)***

PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***

PP v. Azilah Hadri & Ors [2012] 1 CLJ 358 HC ***(refd)***

PP lwn. Hare Krishnan K Subramaniam & Yang Lain [2017] CLJU 866; [2017] 1 LNS 866 CA ***(refd)***

Protea Assurance Co Ltd v. Lamb [1971] (1) SA 530 (A) ***(refd)***

Roncarelli v. Duplessis [1959] SCR 121 ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***
Sathya Vello v. PP [2022] 5 CLJ 659 FC ***(refd)***
Shapiei Zainal Abidin & Yang Lain lwn. Ketua Polis Daerah Shah Alam & Yang Lain [2022] 5 CLJ 786 HC ***(refd)***
Strachan v. The Gleaner Co Ltd & Another [2005] 1 WLR 3204 ***(refd)***
Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***
Takong Tabari v. Government Of Sarawak & Ors & Other Cases [1996] 2 CLJ 1068 HC ***(refd)***
Thangavelu v. Chia Kok Bin [1981] CLJ 132; [1981] CLJ (Rep) 281 HC ***(refd)***
Victor Taichung Machinery Works Co Ltd v. Bright Rims Manufacturing Sdn Bhd & Anor [2002] 1 CLJ 550 HC ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] CLJU 106; [1981] 1 LNS 106 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(8), 8(2)(a), (c), 11
Courts of Judicature Act 1964, ss. 14(1), 25, Schedule para. 1
Dangerous Drugs Act 1952, s. 37B
Evidence Act 1950, ss. 24, 26
Federal Constitution, arts. 4, 5, 8, 124, 145(3), Sixth Schedule
Government Proceedings Act 1956, ss. 5, 6(1), 33(1), (4)
Insolvency Act 1967, ss. 5(3), (4)
National Land Code, s. 22
Penal Code, ss. 299, 330, 331, 348
Police Act 1967, s. 20(3)(j), (m)
Rules of Court 2012, O. 38 r. 2(2), O. 42 r. 12, O. 45, O. 46, O. 47, O. 48, O. 49, O. 50, O. 51, O. 52, O. 59 rr. 7(2)(b), 24, O. 73 r. 12, O. 92 r. 4
Universities and University Colleges Act 1971, s. 24C

Crown Proceedings Act 1947 [Eng], s. 25(4)

For the plaintiffs - Zaid Abd Malek & Khairun Nabila Khairuddin; M/s Daim & Gamany
For the defendants - Nur Ezdiani Roleb & Afiq Nazrin Zaharinan; DPPs

Reported by Lina E

JUDGMENT

Su Tiang Joo J:

Introduction

[1] This is yet another case of a detainee who died whilst under the custody of the police. After a trial on liability by His Lordship Justice Ahmad bin Bache ("LTJ"), judgment was entered against the defendants on 30 August 2022 for liability with damages to be assessed. Dissatisfied, the defendants appealed to the Court of Appeal.

[2] I took over the conduct of the action upon my transfer to the High Court at Kuala Lumpur on 28 February 2023.

[3] On 16 November 2023, the Court of Appeal allowed the appeal on liability in part by rejecting the dependency claim of the alleged wife and child under s. 7 of the Civil Law Act 1956 (Revised 1972) Act 67 ("CLA") on the grounds that the wife has failed to prove she was lawfully married to the deceased and that the child was the lawful child of both she and Balamurugan a/l M Suppiah (hereinafter referred to as "Balamurugan" or "the deceased"). Nevertheless, the Court of Appeal (W-01(NCvC)(W)-727-09-2022) upheld the judgment on the claim by the estate of the deceased under s. 8 of the CLA and remitted the matter back to the High Court for assessment of damages.

[4] During the hearing of the assessment of damages on 30 May 2024, I decided as follows:

(i) RM16,000 was awarded for special damages;

(ii) RM100,000 for general damages;

(iii) the claim for exemplary damages was dismissed;

(iv) RM200,000 for aggravated damages;

(v) RM22,000 for costs which included the disbursements of RM7,000 to obtain the letters of administration of the estate of the deceased; and

(vi) although all the defendants are jointly and severally liable for the estate of the deceased detainee, the judgment creditor is to first seek to secure satisfaction of the judgment debt in whole or in part from the primary tortfeasor (the second defendant) who had been found to have assaulted the deceased whilst under detention, with the post-mortem report showing that the deceased had suffered 20 injuries from multiple blunt-force trauma, before seeking to secure satisfaction of the balance judgment debt in whole or in part from the other judgment debtors.

[5] Dissatisfied, (all) the defendants appealed. Two notices of appeal both dated 4 June 2024 were filed, one (encl. 91) was against the whole of the decision and another (encl. 93) against part of the decision but without setting out which part is being appealed against. These are the grounds of my decision pronounced on 30 May 2024.

Parties

[6] The deceased detainee who was found by the LTJ to have been beaten to death at the hands of the police is Balamurugan.

[7] The first plaintiff, Natthanan Yoochomsuk, is a Thai national. She is one of two co-administrators of the estate of Balamurugan. She claimed to be the lawful wife and dependant of Balamurugan and brought a dependency

claim under s. 7 of the CLA (*infra*) for herself and their child who is also registered as a Thai national. She has in the same action brought a claim on behalf of the estate of Balamurugan under s. 8 of the CLA (*infra*).

[8] The second plaintiff, Balraj a/l Suppiah is the younger brother of Balamurugan. He is the other co-administrator.

[9] The first defendant is Inspector Mohd Noor Husri bin Johari.

[10] The second defendant is Inspector Mohaneswaran a/l Thigarajah.

[11] The third defendant is ASP Norsanizam bin Haji Nordin.

[12] The fourth defendant is ASP Muhammad Khuzairi bin Abd Wahab.

[13] The fifth defendant is the Ketua Polis Negara, Malaysia.

[14] The sixth defendant is the Kerajaan Malaysia (Government of Malaysia).

Sections 7 And 8 Of The CLA

[15] For ease of reference, ss. 7 and 8 of the CLA provide as follows:

A. Section 7 Compensation to persons for loss occasioned by death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].

(2) **Every such action shall be for the benefit of the wife,** husband, parent, **child** and any person with disabilities under the care, if any, **of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.**

(3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

Provided that:

(i) in assessing the damages there shall not be taken into account -

(a) any sum paid or payable on the death of the person deceased under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

A (b) any sum payable, as a result of the death, under any written law relating to employees' provident fund;

(c) any pension or gratuity, which has been or will or may be paid as a result of the death; or

B (d) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever, in respect of the death;

(ii) damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought;

C (iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife; and

D (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall -

(a) take into account that where the person deceased has attained the age of sixty years at the time of his death, his loss of earnings for any period after his death shall not be taken into E consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was receiving earnings by his own labour or other gainful activity prior to his death;

F (b) take into account only the amount relating to the earnings as aforesaid and the Court shall not take into account any prospect of the earnings as aforesaid being increased at any period after the person's death;

(c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living G expenses of the person deceased at the time of his death;

(d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between H thirty one years and fifty-nine years at the time of his death, the number of years' purchase shall be calculated by using the figure 60, minus the age of the person at the time of death and dividing the remainder by the figure 2.

(3A) An action under this section may consist of or include a claim for I damages for bereavement and, subject to subsection (3D), the sum to be awarded as damages under this subsection shall be thirty thousand ringgit.

(3B) A claim for damages for bereavement shall only be for the benefit of -

(a) the spouse of the person deceased;

(b) the child of the person deceased; and

(c) the parents of the person deceased.

(3C) Where there is a claim for damages under subsection (3B), the sum awarded shall be divided equally between them subject to any deduction likely to be made in respect of all costs and expenses including cost not recovered from the defendant.

(3D) The Yang di-Pertuan Agong may from time to time by order published in the *Gazette* vary the sum specified in subsection (3A).

(3E) An order made under subsection (3D) shall be published in the *Gazette* and as soon as possible thereafter, shall be laid before the Dewan Rakyat; and if the Dewan Rakyat passes a resolution annulling the order, it shall be void but without prejudice to the validity of anything previously done thereunder or to the making of a new order as from the date of notification in the *Gazette* of the passing of the resolution.

(4) The amount, other than the amount awarded under proviso (iii) to subsection (3) and the amount recovered under subsection (3B), so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them in such shares as the Court by its judgment or decree directs.

(5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

(6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect, or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

(7) The plaint or writ or summons in any such action shall give full particulars of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

(8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the person, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

(9) It shall be sufficient for any defendant in any action brought under this section to pay any money, he is advised to pay into Court as a compensation, in one sum to all persons entitled under this section for his wrongful act, neglect or default without specifying the shares into which it is to be divided.

(10) If the said sum is not accepted and an issue is taken by the plaintiff as to its sufficiency and the Court thinks the same sufficient, the defendant shall be entitled to judgment upon that issue.

(11) In this section unless the context otherwise requires -

"child" includes son, daughter, grandson, granddaughter, stepson and stepdaughter;

"parent" includes father, mother, grandfather and grandmother;

"pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment:

Provided that in deducing any relationship referred to in this subsection any illegitimate person or any person who has been adopted, or whose adoption has been registered, in accordance with any written law shall be treated as being or as having been the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

B. Section 8 Effect of death on certain causes of action

(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person -

(a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

(b) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either -

(a) were pending at the date of his death; or

(b) are taken not later than six months after his personal representative took out representation.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.
(emphasis added)

High Court Judgment Of 30 August 2022 On Liability

[16] With the view to give context to these grounds of judgment, I set out the findings of the LTJ on liability (encl. 72).

[17] On 6 February 2017, at around 6.30pm, Balamurugan together with two other individuals, Ang Kian Kok and Taminarasan a/l Karapiah were arrested at Jalan Batu Belah, Klang by police officers from Balai Polis Bandar Baru Klang.

[18] On 7 February 2017, at around 8.45am, Balamurugan was brought to the Magistrate's Court in Klang for remand. During the remand proceedings, the learned Magistrate was informed by his lawyer that Balamurugan was beaten up whilst in custody and appeared to be unwell and weak. Consequently, the Magistrate dismissed the remand application and directed that Balamurugan be brought to the hospital for treatment.

A **Defiance Of Magistrate's Direction**

[19] However, in defiance of the learned Magistrate's order, the police did not bring Balamurugan to the hospital. Instead, the police brought him to the North Klang District Police Headquarters. No medical treatment was provided to him.

B

[20] The third defendant allegedly re-arrested Balamurugan and continued to detain him at the North Klang District Police Headquarters. The LTJ found that this allegation of Balamurugan having been re-arrested to be contrived because no arrest report was produced to substantiate the same. In other words, it was made up to seek to excuse the continued detention.

C

[21] Later, on the same day *ie*, 7 February 2017 at around 11pm, the first defendant found Balamurugan unconscious and a medical officer was called. However, Balamurugan was pronounced dead on 8 February 2017 at around 12.10am.

D **[22]** There were two post-mortems conducted on his body by separate pathologists; firstly, by Dr Kartini binti Md Ariff on 8 February 2017, and secondly, by Dr Siew Sheue Feng on 18 February 2017.

[23] Both post-mortem reports confirmed that the cause of death of Balamurugan was coronary artery disease with multiple blunt-force trauma and that the injuries found on Balamurugan were not accidental or self-inflicted.

E

[24] A public hearing was later conducted by the Enforcement Agency Integrity Commission (EAIC) regarding the death of Balamurugan. The EAIC found that the police force was responsible for causing his death – and hence the suit.

F

[25] The death of Balamurugan whilst in the defendants' custody is out of the ordinary. It *prima facie* proves the existence of negligence, and the onus was cast upon the defendants to give a credible explanation to rebut the presumption of negligence. From the evidence, the LTJ was satisfied that although Balamurugan was quite sickly, when he was detained by the defendants as from 6 February 2017, he was well but was confirmed dead on 8 February 2017 at 12.10am whilst in the defendants' custody.

G

[26] The LTJ accepted the evidence of SP2 (plaintiffs' witness no. 2) that there were injuries sustained by Balamurugan, which were fresh and occurred recently before his death.

H

[27] It was found as a fact, that Balamurugan had complained to the remand Magistrate on 7 February 2017 that he was beaten up by the police for refusing to confess to a crime. This fact was acknowledged by the first defendant, who was the investigating officer in charge of Balamurugan.

I

[28] The LTJ made reference to the EAIC report, where it was found *inter alia* that the injuries found on Balamurugan were consistent with testimonies regarding the acts of physical violence committed by the second defendant on him. The following findings of the EAIC were highlighted (where the second defendant was identified as SP27) in the EAIC proceedings:

> 8.1.5 Berdasarkan corak kecederaan yang ditemui, SP-11 dan SP-12 mendapati kecederaan ini tidak terjadi secara kemalangan mahupun ditimpakan oleh diri sendiri. Kesan kecederaan yang ditemui pada badan si mati ini konsisten dengan bentuk kekerasan yang digunakan oleh SP-27 sepertimana yang dilihat oleh SP-1 dan SP-17.

[29] The LTJ observed that when these findings were posed to the second defendant under cross-examination, he could not give any reply except to give a bare denial. This uncontroverted evidence was held by the LTJ to be strong evidence that the plaintiffs had proved the culpability of the second defendant for being responsible for the death of Balamurugan.

[30] SP2 (the forensic pathologist) testified that the injuries found on the body of the deceased were not self-inflicted nor accidental; SP2 said:

> The overall pattern of injuries found on his body is neither self-inflicted nor accidental in nature.

[31] The injuries led to the death of Balamurugan:

(i) the LTJ held that the injuries sustained by Balamurugan occurred whilst he was under the custody of the defendants and that these injuries were caused by the second defendant.

(ii) that there was no reason why Balamurugan was not brought to the hospital for medical attention. The first and third defendants' refusal and/or failure to bring him to the hospital despite there being an order from the Magistrate as well as their own awareness of his critical condition is a clear breach of their duty which had resulted in the death of the deceased.

(iii) that it was clear and obvious that the defendants herein had acted negligently and this is a direct cause of the death of Balamurugan.

[32] Assault and battery.

The LTJ held that the evidence of assault and battery pointed to the second defendant because of the following:

(i) that Balamurugan himself had communicated to the Magistrate that he was beaten up by the police for refusing to admit his involvement in a crime;

(ii) the injuries found on the body of the deceased are consistent with testimonies that pointed to the second defendant beating up the deceased;

(iii) that the second defendant had only given a bare denial when challenged that he had physically assaulted him in the process of examining and interrogating him.

[33] Breach of statutory duty.

(i) the LTJ held that it is axiomatic that over and beyond the duty of care under the common law of tort, the defendants also have a statutory duty of care towards the deceased as per s. 20 of the Police Act 1967, and the defendants have breached this statutory duty. I set out hereunder the relevant provisions of sub-s. 20(3) paras. (j) and (m) of the Police Act 1967:

> (3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including -
>
> (j) giving assistance in the protection of life and property;
>
> (m) escorting and guarding prisoners and other persons in the custody of the police.

[34] False imprisonment.

(i) after the learned Magistrate had refused to grant a remand order and had ordered for Balamurugan to be brought to the hospital for treatment on 7 February 2017, the refusal by the defendants to release him amounted to the false imprisonment of Balamurugan.

(ii) as mentioned above, the LTJ held that the assertion by the defendants that there was a re-arrest order was an afterthought as there was no arrest report produced to support such an assertion.

[35] The LTJ concluded that the first to the fourth defendants were found liable for the death-in-custody of Balamurugan and the fifth and the sixth defendants are vicariously liable for the acts of the first to the fourth defendants pursuant to s. 5 of the Government Proceedings Act 1956 (Revised 1988) Act 359 ("GPA"), even for the acts that both of them did not authorise with reliance placed upon the authority of *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39. Section 5 of the GPA provides that:

> **Liability of the Government in tort**
>
> Subject to this Act, the Government shall be liable for **any wrongful act done or any neglect or default committed by any public officer** in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and

without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government. (emphasis added)

Appeal To The Court Of Appeal On Liability

[36] Dissatisfied, the defendants appealed against the whole of the High Court's decision on liability to the Court of Appeal on 26 September 2022.

[37] On 16 November 2023, after hearing the appeal, the Court of Appeal, by way of a unanimous decision, handed down the following broad grounds of its decision:

> [1] The Respondents' claim is based on s. 7 and 8 of the Civil Law Act and both claims were allowed by the learned HCJ. [2] However, we are of the considered opinion that the s. 7 claim is not supported by any documentary evidence. R1, the alleged wife did not come to court to give any evidence. There is no certificate of marriage and no birth certificate of the child that was tendered in court. There is simply no documentary evidence of the marriage at all. [3] What is left is the evidence of R2, the brother of the deceased, and this is hearsay evidence. [4] As such, the dependency claims under s. 7 have not been proven. The Respondent tried to rely on the 'senarai beneficiary' but the same was not tendered in court. [5] In the circumstances, the appeal is allowed in part and that the dependency claim under s. 7 is set aside. [6] The claim under s. 8 is maintained and the damages are to be assessed based on s. 8 claim. Since the appeal is allowed in part, we make no order as to costs.

Assessment Of Damages

[38] On 5 September 2023, the plaintiffs filed a notice of application (encl. 73) for directions for the assessment of damages.

[39] On 12 December 2023, directions were given by the learned Senior Assistant Registrar ("SAR") for the assessment of damages. To a question posed by the learned SAR on whether the assessment was to be carried out by way of affidavits or with the calling of witnesses, learned counsel for the plaintiffs sought for it to be conducted by way of affidavits. No objections were raised by learned Federal Counsel for the defendants. Directions were then given for the filing of affidavits. The matter was then fixed for case management on 12 March 2024 by way of e-review to ascertain whether all the affidavits have been filed.

[40] On 12 March 2024, the learned SAR was appraised that all the affidavits have been filed. Although the plaintiffs have filed an affidavit out of time, learned Senior Federal Counsel ("SFC"), Puan Nur Azdiani, graciously said that the defendants have no objections to it. Directions were then given for the filing of written submissions which were duly complied with by the plaintiffs (encl. 85 and encl. 89) and the defendants (encl. 83 and encl. 87).

[41] Under Practice Direction No 2/2021 dated 30 March 2021, the (then) Chief Judge of Malaya directed that all proceedings in connection with an assessment of damages are to be heard by the judge or Judicial Commissioner. In due course, the assessment of damages in this action came before me for hearing on 30 May 2024.

Preliminary Objection

[42] A preliminary objection was raised by learned Senior Federal Counsel that the plaintiffs have failed to call their witnesses to prove the special damages claimed for funeral expenses of RM15,000 and legal charges of RM7,000 for obtaining the letters of administration.

[43] I find this objection to be without merits because during the case management for directions for assessment of damages on 12 December 2023, no objections were raised by the defendants when the plaintiffs sought for the assessment to be conducted by way of evidence being led in the form of affidavits. And, on 12 March 2024, learned SFC said that she had no objections to the late filing of the affidavit in reply (encl. 79) by the plaintiffs. Further, the defendants could have applied to cross-examine the deponent of the two affidavits (encl. 74 and encl. 79) filed by the plaintiffs but they did not. See O. 38 r. 2(2) of the Rules of Court 2012, which provides as follows:

> (2) In any cause or matter begun by originating summons *and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross- examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.* (emphasis added)

Estoppel Against Findings On Liability By The LTJ

[44] During the course of the assessment of damages, the defendants sought to challenge the findings on liability by the LTJ in their submissions (encl. 83). This is surprising because they ought to know they are estopped from doing so when upon their appeal against liability, these findings were not set aside by the Court of Appeal. See *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57 where Gopal Sri Ram JCA (then) said:

> If authority is needed for the proposition which has commended itself to us, it is to be found in *Government Of Malaysia v. Dato Chong Kok Lim* [1973] CLJU 35; [1973] 1 LNS 35 which was drawn to the attention of Counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p. 76):
>
> In *Satyadhyan Ghosel And Others v. Sint Deorajin Dobi & Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:

> *The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed,* or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation.
>
> The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> *The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*
>
> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch. D 182, *Hook v. Administrator-General of Bengal and Others* LR 48IA 187 and *In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] CLJU 23; [1936] 1 LNS 23; [1936] MLJ 141, 147-151). *Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.* (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381). (emphasis added)

[45] To underscore the estoppel point, see the decision by the Privy Council in *Strachan v. The Gleaner Co Ltd And Another* [2005] 1 WLR 3204, where it was held that:

> The first is that once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata* … The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount which remains to be determined.

[46] Thus, the submissions presented by the defendants seeking to revisit the issue that the injuries suffered by Balamurugan may not be sufficient to cause the death to a normal healthy individual is of no relevance, more so, when the LTJ had clearly applied the "egg-shell skull rule" that the defendants must take Balamurugan as they had found him (encl. 72 para. 27). In the words of the LTJ (encl. 72 para. 28):

A

> Thus, it is crystal clear that the cause of death of the Deceased is due to the actions of the Defendants regardless of the fact that the Deceased was a sick person.

[47] It is to be observed that the egg-shell skull rule applies not only in civil law but also to criminal law as can be seen in the provision of s. 299 of the
B Penal Code (Revised 1997) Act 574 on culpable homicide, where it is provided under Explanation 1 that:

> A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

C

[48] Under the Penal Code, the sentence for a person convicted of culpable homicide is very heavy and the term of imprisonment can be for a term which may extend to 30 years if it is culpable homicide not amounting to murder. If it amounts to murder, the sentence is death or imprisonment for a term of not less than 30 years but not exceeding 40 years, and if not
D sentenced to death, shall also be punished with whipping of not less than 12 strokes.

[49] From the court records of this action and neither was this court informed that any of the first to the fourth defendants have been charged with any criminal offence. It begs the question, why not? In fact, in a death in
E custody case, a police officer was charged with the murder of the detainee although he was acquitted due to lack of proof, see *PP lwn. Hare Krishnan K Subramaniam & Yang Lain* [2017] CLJU 866; [2017] 1 LNS 866; [2017] MLJU 1003.

F **[50]** It is clearly apparent that the Attorney General is placed in a conflict of interest situation. On the one hand, art. 145(3) of the Federal Constitution confers upon the Attorney General the discretion to institute, conduct or discontinue any proceeding for a criminal offence subject to appropriate, rare and exceptional circumstances, see *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199 at para. [112]. On the other hand,
G the Attorney General through his officers are here in this court defending those who were culpable in the death of Balamurugan.

Damages Claimed – Special, General, Exemplary And Aggravated

[51] I now turn to the damages sought by the plaintiffs. In undertaking the
H assessment, I bear in mind that the Court of Appeal had set aside the decision of the LTJ allowing the plaintiffs' s. 7 of the CLA dependency claim on the grounds of lack of proof that the first plaintiff was the wife of Balamurugan, and that the child was their child.

General Principles

I

[52] An assessment of damages is for all intents and purposes, a continuation of the trial, see *Victor Taichung Machinery Works Co Ltd v. Bright Rims Manufacturing Sdn Bhd & Anor* [2002] 1 CLJ 550. Damages are not to

enrich the plaintiff and must be reasonable, fair, adequate and not excessive, see *Yang Salbiah & Anor v. Jamil Harun* [1981] CLJU 106; [1981] 1 LNS 106; [1981] 1 MLJ 292. It is trite that damages serves as a compensation, not a reward, less still a punishment and in assessing damages, the courts should not be motivated by sympathy and award fair compensation based on cogent evidence, see *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1.

Special Damages

[53] A claim for funeral expenses can be brought by the estate of the deceased pursuant to s. 8(2)(c) of the CLA (*supra*).

[54] Indeed, the plaintiffs brought a claim for RM15,000 for funeral expenses (encl. 78 exh. BS6). I find that although the defendants challenged the admissibility of the invoice issued by Kailaasum Shah Alam Casket for RM15,000 for the funeral expenses of the deceased, they offered RM10,000 (encl. 85 paras. 20 and 29). As I have observed earlier, the defendants could have applied for the deponent of the affidavit (encl. 78), who is the second plaintiff, to be cross-examined but they did not do so. Therefore, I accept the invoice showing that RM15,000 had been incurred for the funeral expenses of the deceased detainee.

[55] The claim of RM1,000 for medical bills for the cost of two post-mortem reports, evidenced by two receipts of RM500 each issued by the Jabatan Perubatan Forensik dated 1 November 2017 (see encl. 78 exh. BS6) was agreed by the defendants (E85 para. 31) and is allowed.

[56] A further sum of RM7,000 incurred by the plaintiffs to obtain letters of administration of the estate of the deceased was claimed. This expenditure, according to learned counsel for the plaintiffs, was to confer upon the plaintiffs the necessary *locus standi* to sue. It is to be observed that it expressly provided under s. 7(8) of the CLA (*supra*) that a dependency claim can be pursued if there is no executor appointed after six months from the date of the deceased by the persons entitled to claim, that is, the dependants. However, this exception is not provided in a claim by the estate of the deceased, see s. 8 of the CLA (*supra*). Thus, as this action was for both a dependency and an estate claim, it was proper and in fact correct for the plaintiffs to apply for letters of administration for the purposes of initiating the action, see *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors* [2014] 5 CLJ 669; [2014] 6 MLJ 651 at para. [12].

[57] However, in my considered opinion, instead of claiming it as an item of special damages, this item can be claimed under disbursements reasonably incurred for purposes of bringing the action and should rightfully come to be determined together with the item of costs. Order 59 r. 7(2)(b) of the Rules of Court 2012 states:

Stage of proceedings at which costs are to be dealt with (O. 59, r. 7)

(2) At the conclusion of the proceedings, the Court will hear submissions from the parties as to the quantum of costs to be awarded and shall order such costs as it deems fit. The Court shall direct that the submissions of the parties on costs are to be tendered as part of the substantive submission of the case or separately and there shall be annexed to the submission of costs a bill for such costs which shall be in Form 117, and shall include particulars of the following:

(a) work done including the value of getting up; and

(b) **all disbursements reasonably incurred.**

(emphasis added)

[58] I observed that the defendants had offered RM5,000 for this item (encl. 83 para. 30) with no materials provided to support such an amount. In my considered view, as there is a fee note dated 28 April 2018 by a firm of solicitors issued for RM7,000, I am minded to award this sum of RM7,000. It is, however, to be awarded as part of the disbursements reasonably incurred over and on top of costs rather than as special damages.

General Damages

[59] In one of the leading authorities on damages, the Court of Appeal in *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784 at para. [14] held that:

> It is trite that a person injured by another's wrong is entitled to general damages for non-pecuniary such as his pain and suffering, hardship, discomfort, mental distress and loss of amenities of life. There is no standard rule to measure the damage in such cases. The courts usually determine the amount based on a fair and reasonable standards, free from sentimental or fanciful standards, and based upon evidence adduced. The court should also consider the age, health and condition of the injured party pre-injury as compared with his condition after the injury. The court also consider the need for medical, psychological or physical symptoms, and the impact on the plaintiff's conduct and lifestyle before apportioning the amount of damages.

[60] The defendants offered RM3,000 for general damages for pain and suffering. Reliance was placed by them on the case of *Takong Tabari v. Government Of Sarawak & Ors And Other Cases* [1996] 2 CLJ 1068; [1996] 5 MLJ 435. In *Takong Tabari,* the plaintiff was in the Public Bank when an explosion occurred. He suffered injuries and died about ten and a half hours after the accident. The explosion was as a result of leakage of natural gas fixed by the Public Works Department to the bank. Despite being aware of an unusual smell, the bank personnel did not take any steps to locate and take remedial measures. The bank as occupier was found liable for breach of duty

of care. The Government of Sarawak was also found liable because its Public Works Department supplied gas to a building which was not an accredited gas consumer. Reliance was also placed by the defendants on the case of *Thangavelu v. Chia Kok Bin* [1981] CLJ 132; [1981] CLJ (Rep) 281; [1981] 2 MLJ 277 where in a motor accident case, the deceased died 11 months and six days after the accident. He was awarded RM20,000 for pain and suffering as he was not totally unconscious after the accident.

[61] I find that the facts as found by the LTJ in this case, and which I have narrated above to be wholly different from that in *Takong Tabari* (*supra*) and *Thangavelu* (*supra*) because besides succeeding in negligence as a cause of action and breach of statutory duty, the plaintiffs have also succeeded under the causes of action of assault and battery as well as false imprisonment.

[62] As found by the LTJ, Balamurugan was subject to severe beatings, leading to him suffering the following injuries as found by the forensic pathologist (SP2):

Marks of injury:

(i) left periorbital haematoma, measuring 3 x 3cm.

(ii) bruise, measuring 0.2 x 0.2cm at inner aspect of right upper-eyelid.

(iii) haematoma, measuring 13 x 10cm at right temporo-periauricular areas.

(iv) haematoma, measuring 12 x 6cm at right side of chest, below the nipple.

(v) bruise, measuring 5 x 3cm at lateral aspect of right side of chest.

(vi) bruise, measuring 2 x 1cm at antero-lateral aspect of distal end of right forearm.

(vii) bruise, measuring 2 x 1cm at postero-medial aspect of distal end of right forearm.

(viii) bruise, measuring 1.5 x 1cm at postero-medial aspect of distal end of left forearm.

(ix) bruise, measuring 5 x 5cm at back of left wrist.

(x) bruise, measuring 2 x 1. 5cm at second knuckle of left hand.

(xi) bruise, measuring 3 x 2cm at third knuckle of left hand.

(xii) haematoma, measuring 15 x 3cm of subcutaneous tissues at lateral aspect of upper half of left thigh.

(xiii) haematoma, measuring 19 x 8cm at antero-lateral aspect of lower half of left thigh.

(xiv) haematoma, measuring 6 x 5cm at the left knee.

(xv) haematoma, measuring 33 x 7. 5cm at left shin, left ankle and dorsum of left foot.

(xvi) haematoma, measuring 13 x 4cm at back of left lower leg.

(xvii) haematoma, measuring 8 x 7cm at right knee area.

(xviii) subcutaneous contusion with haematoma, measuring 30 x 9cm of muscles at the front and lateral aspects of right lower leg.

The following injuries are found on deep dissection performed during the second post-mortem examination:

(xix) Haematoma, measuring 8 x 8cm of muscles at middle third of postero-lateral aspect of left thorax.

(xx) Haematoma, measuring 7 x 6cm of muscles at lower third of postero-lateral aspect of left thorax.

[63] Thus, in my considered view the cases on death in custody would be more relevant. In this regard, I find the following cases cited by the plaintiffs to be helpful:

(i) *Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors* [2021] 10 CLJ 915 a decision of Quay Chew Soon J, a case of death in custody case where a sum of RM50,000 was awarded for pain and suffering for not providing the deceased medical attention and assistance;

(ii) *Marry Mariay Susay (Sebagai Pentadbir Sah Estet Serta Tanggungan Dharmendran Narayasamay v. Insp Hare Krishnan Subramaniam & Ors* Guaman Sivil No. WA-21NCvC-44-05-2016 (HC) a decision of His Lordship Ahmad Zaidi bin Ibrahim J (now JCA) (para. 24a of Ps subs in E85) on this death in custody case brought by the wife of the deceased detainee, a sum of RM150,000 was awarded for general damages.

Learned counsel for the plaintiffs was not able to provide the grounds of judgment of the High Court but with the aid of the Lexis Advance Malaysia Research search engine, and after typing in the name of "Marry Susay", I found that the details of the post-mortem report of the deceased husband of Marry Susay can be found in the case of *PP lwn. Hare Krishnan K Subramaniam & Yang Lain* [2017] CLJU 866; [2017] 1 LNS 866; [2017] MLJU 1003 where the following post-mortem findings were made at paras. [18] and [19] on how the detainee died whilst detained by the police officer who was charged (but acquitted) with the murder of the deceased detainee:

[18] Mayat si mati dibedah siasat oleh Dr. Siew Sheue Feng (SP51) (who coincidentally is the same forensic examiner for the deceased in this case, see E78 exhibit BS-5), Pakar Perubatan Sains Forensik HKL. Dalam laporan

bedah siasat (eksibit P45), SP51 menyatakan bahawa si mati pada 21.5.2013 jam 2.00 petang. SP51 mendapati sejumlah 52 kecederaan luaran pada si mati, kebanyakannya lebam-lebam dan lebam dangkal di seluruh badan. Terdapat juga kesan cucukan dipercayai dari besi kokot ("stapler") di bahagian kaki dan terdapat stapler yang masih tertanam di bahagian telinga kiri dan kanan si mati. Terdapat juga kesan darah yang masih baru di selaput kulit si mati.

[19] SP51 memberi pandangan bahawa kecederaan-kecederaan lebam dan lebam dangkal yang dialami oleh si mati adalah sepadan dan diakibatkan oleh benda tumpul dan keras atau hentakan kepada permukaan yang tumpul dan keras. Kematian si mati adalah berpunca daripada kehilangan darah dari urat-urat darah akibat trauma terhadap seluruh badan si mati yang telah mengakibatkan bekalan oksigen ke organ penting tidak mencukupi. Sebab-sebab kematian disimpulkan oleh SP51 sebagai "Diffuse soft tissue injuries due to multiple blunt force trauma.

(emphasis added)

(iii) *Norizan Salleh v. Mohd Firdaus, Ketua Polis Daerah Sentul & Ors* Guaman Sivil No. 21NCvC-227-10-2012, a decision of Her Ladyship, Hue Siew Kheng J, a sum of RM50,000 was awarded for general damages;

(iv) *N Indra Nallathamby v. Datuk Seri Khalid Abu Bakar & Ors* [2013] 6 CLJ 272 (also known as known as the *Kugan*'s case) a decision of His Lordship, VT Singham J, which is a death in custody case. The High Court found that there had been systematic ill-treatment, torture, assault and battery inflicting grievous injuries which caused the death of the plaintiff's son, Kugan, who was detained for the theft of a motorcar – a sum of RM50,000 was awarded for general damages.

[64] I am aware that I am not bound by the awards made in the above cases. See the South African case of *Protea Assurance Co Ltd v. Lamb* [1971] (1) SA 530 (A) at 535H-536A, where the following advice was given:

> It should be emphasized, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters.

[65] The above South African case was cited with approval by Her Ladyship, Khadijah Idris J in *Shapiei Zainal Abidin & Yang Lain lwn. Ketua Polis Daerah Shah Alam & Yang Lain* [2022] 5 CLJ 786; [2022] MLRHU 552 at para. [28].

[66] Nevertheless, these awards serve as a useful guide. Given the factual matrix in this case and taking into account the post-mortem report on the injuries Balamurugan suffered at the hands of the police, in particular, the second defendant, I am of the considered opinion that, a sum of RM100,000 would serve as adequate compensation for the pain (including mental distress) and sufferings suffered by him.

Exemplary Damages

[67] The plaintiffs concede that s. 8 of the CLA bars an award of exemplary damages. This concession is rightfully made by reason of the provision of s. 8(2)(a) of the CLA (*supra*). See the Federal Court case of *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157, whereby a majority decision, it was held as follows:

> Section 8(2) of the Civil Law Act 1956 is an absolute bar to the award of exemplary damages in an estate claim. In order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour. The objective of the grant of exemplary damages is not to compensate the plaintiff but to punish and deter the defendant from and for committing such wrongs. The Federal Constitution does not provide the right of the estate of a deceased to such damages.

[68] The plaintiffs sought to rely upon the other Federal Court authority of *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141 at paras. [122] to [126] on a case of custodial assault and police brutality where the detainee was blindfolded, stripped and assaulted, and where the award of exemplary damages of RM50,000 made by the High Court was upheld by the Court of Appeal but was increased by the Federal Court to RM100,000 "to reflect the court's indignation towards the action of the police".

[69] With respect, as was observed by Her Ladyship, Rhodzariah Bujang FCJ in *Koperal Zainal Mohd Ali* (*supra*) at para. [13], *Hassan Marsom*'s case can be distinguished as it:

> … does not involve an estate or a dependant's claim but rather a personal one by the respondent who was assaulted whilst in police custody following his arrest over an alleged involvement in a fight with a policeman which occurred earlier.

[70] I observed that learned counsel for the plaintiffs had advanced the argument that premised upon the power of the court in para. 1 of the Schedule to s. 25 of the Courts of Judicature Act 1964, this court has the power to grant relief and in particular exemplary damages for breach of a fundamental right to life housed within art. 5 of the Federal Constitution. I observed that this point was persuasively canvassed in great detail by the dissenting decision of Her Ladyship, Nallini Pathmanathan FCJ in *Koperal Zainal Mohd Ali* (*supra*) at paras. [102] to [136] and who awarded a sum of RM200,000 by way of exemplary damages (see para. [136]).

[71] Whatever opinion this court may have as to why exemplary damages can or cannot be awarded by this court, it is indisputable that the assessment of damages is for a judgment for an estate claim. Premised on the doctrine of *stare decisis* or precedents (see *Dato' Tan Heng Chew v. Tan Kim Hor*

& Another Appeal [2006] 1 CLJ 577 at para. [2]; [2006] 2 MLJ 293), this court is bound by the decision of the Federal Court in *Koperal Zainal Mohd Ali* (*supra*) and by reason thereto the claim by the plaintiffs as co-administrators of the estate of the deceased for exemplary damages is disallowed.

Aggravated Damages

[72] The plaintiffs sought a sum of RM100,000 for aggravated damages.

[73] The contumelious or reprehensible conduct of the defendants as narrated in the findings of the LTJ on liability was repeated.

[74] It has to be highlighted that the severe beatings that Balamurugan was subjected to was to try to illegally extract a confession from him. Despite Balamurugan having sought and obtained the empathy and compassion of the learned Magistrate who refused a remand order and directed the police to bring him for medical treatment, the defendant police officers thumbed their noses at the learned Magistrate's order. Instead, they sought to disguise their defiance by saying there is a re-arrest which is wholly disingenuous, and does not deal with the issue of the poor medical condition Balamurugan was in.

[75] The suffering of Balamurugan was at the hands of the police officers who had abused their powers which were meant to protect life, a right, which is so fundamental that it is housed in the Federal Constitution under Part II on Fundamental Liberties and in particular art. 5 which provides that:

> *(1) No person shall be deprived of his life or personal liberty save in accordance with law.*
>
> *(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.*
>
> *(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*
>
> *(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:*
>
> > *Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:*
> >
> > *Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":*

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> And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.
>
> (5) Clauses (3) and (4) do not apply to an enemy alien.
>
> (emphasis added)

B

[76] It is, thus, clear that elaborate provisions have been made in the supreme law of the Federation of Malaysia (see art. 4) to protect the sanctity of a person's life and liberty.

C

[77] Given the findings of the LTJ, I am of the considered view that an award of aggravated damages in the sum of RM200,000, which is double from what was sought by the plaintiffs, is to be awarded. In doing so, I bear in mind the words of Her Ladyship, Rhodzariah Bujang FCJ in *Koperal Zainal* (*supra*) at para. [32] that:

D

> Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s. 8(2) of the CLA, *the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in Broome's case (supra) at p. 1073:*

E

> > *In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.* (emphasis added)

F

Costs

G

[78] Regarding costs for the assessment of damages, the plaintiffs asked for RM50,000 whereas the defendants offered RM10,000.

[79] I bear in mind that the LTJ had awarded costs of RM40,000 for the trial on liability which took up three days with seven witnesses called. The hearing for the assessment took only less than one day as I have read all the

H

papers including the grounds of judgment on liability, the minutes of the Court of Appeal, the affidavits and submissions filed. This is not meant to devalue the work done by learned counsel to get up the case for the assessment of damages, but as a matter of proportionality to the work done for the trial on liability, I award a sum of RM15,000 as costs for the

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assessment proceedings plus a sum of RM7,000 as disbursements for purposes of obtaining the letters of administration of the estate of the

deceased. As prescribed under O. 59 r. 24 of the Rules of Court 2012, interest shall accrue on the award for costs and disbursements at 5% p.a. from the date of the award until full payment. Order 59 r. 24 of the Rules of Court 2012 is reproduced hereunder:

> **Interest on cost (O. 59, r. 24)**
>
> 24. Any award of costs made under this Order shall carry such interest as may be specified under Order 42, rule 12, from the date of award of cost until full payment.

[80] As the defendants are principally from the Government agency of the police force with the Government of Malaysia being held vicariously liable, there will be no allocatur fee on the costs payable.

Further Order – To Underscore The Court's Abhorrence Against The Wrong Perpetrated By The Second Defendant, The Judgment Creditors (Plaintiffs) Are To First Seek Satisfaction Of The Judgment Debt From The Second Defendant

[81] Learned Senior Federal Counsel asserted that the further order ought not to be made by reason of ss. 5 and 6 of the Government Proceedings Act 1956 (Revised 1988) Act 359 ("GPA").

[82] Pursuant to s. 5 (*supra*) and s. 6(1) of the GPA, the sixth defendant who is the Government of Malaysia, is liable by reason of the liability found against the other defendants, and in particular, the second defendant. Section 6(1) of the GPA provides as follows:

> **6 Limits of liability of the Government**
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[83] Although all the defendants are jointly and severally liable to satisfy the judgment debt, pursuant to s. 6(1) of the GPA, it is clear that the sixth defendant would not have been liable if not for the acts of the other defendants, in particular the second defendant. The liability of the sixth defendant is one of vicarious liability imposed by statute namely the GPA, and not pursuant to common law, see *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 at para. [12].

[84] To underscore the abhorrence of the court against the wrongdoing of the second defendant, who had abused his powers to detain and interrogate those suspected of committing criminal offences, I made an order ("further order") that the plaintiffs are to first seek to secure satisfaction of the judgment debt in whole or in part from the primary tortfeasor (the second defendant) before seeking to secure satisfaction of the balance judgment debt in whole or in part from any of the other judgment debtors including the sixth defendant who is the Government of Malaysia.

[85] Section 33 of the GPA contains provisions for "Satisfaction of orders against the Government". Subsection 33(4) thereof has a provision on the prohibition against execution save by way of first securing a certificate for payment pursuant to s. 33(1) of the GPA. In my considered view, this prohibition is applicable only if execution is sought to be enforced against the Government. Section 33 of the GPA provides as follows:

> (1) Where in any civil proceedings *by or against the Government* or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, *any order* (including an order for costs) *is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application* in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, *issue to that person a certificate in the prescribed form containing particulars of the order:*
>
> > Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
>
> (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record *as the advocate for the Government or for the Government department or officer concerned.*
>
> (3) *If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay* to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:
>
> > Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.
>
> *(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.*
>
> (5) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter. (emphasis added)

[86] In *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, Arifin Zakaria FCJ (later CJ) said that the position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditional approach that the Crown can do no wrong. And, Abdul Hamid Mohamad CJ (as His Lordship then was), who wrote the leading judgment in *Petrojasa* said:

> **[26] I have said earlier that the effect of s. 33 GPA and O. 73 r. 12(1) of the RHC 1980 is that, the only method of enforcing a monetary judgment against a Government is by way of obtaining a certificate.**
> (emphasis added)

[87] In *Pacific Bunkers Pte Ltd v. Owners Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" & Another Case (No 2)* [2015] 7 CLJ 1071 at para. [36] on the construction of the words "Save as aforesaid", Wong Kian Kheong JC (now JCA) made reference to the case of *Petrojasa* (*supra*) and highlighted that Arifin Zakaria FCJ (later CJ) at para. [340] interpreted the phrase "Save as aforesaid" in sub-s. 33(4) of the GPA as follows:

> [51] In my opinion the word "save" as used in sub-s. (4) (s. 33(4) GPA) means "except" or "other than". (See *Concise Oxford English Dictionary* 10th edn.) Therefore, "Save as aforesaid" would mean that except or other than as provided in the preceding sub-ss. (1), (2) and (3), no execution *etc*. shall be issued **against the Government** for enforcing payment of any judgment sum or costs as stated in the preceding sub-sections.
> (emphasis added)

[88] In *Hj Wan Habib Syed Mahmud & Anor v. The State Government Of Sarawak* [2007] 4 CLJ 832, Justice David Wong Dak Wah JC (later CJSS) at para. [18] said:

> … The presumption of the law must be that all State Governments in Malaysia are solvent and always in a position to honor its statutory duties. **That presumption is the reason why we have laws prohibiting enforcement of judgment for payments against the government.** (see s. 33(4) of the Government Proceedings Act 1956).
> (emphasis added)

[89] As highlighted by His Lordship in *Petrojasa* (*supra*) s. 33 of the GPA is for the benefit of the Government when read together with the provisions of O. 73 of the Rules of Court 2012 on "Proceedings by and against the Government". Under O. 73 r. 12 on "Execution and satisfaction of orders", it is provided that:

> (1) Nothing in *Orders 45 to 52 shall apply in respect of any order **against the Government.**
>
> (2) An application under the proviso to subsection (1) of section 33 of the Government Proceedings Act 1956, for a direction that a separate certificate shall be issued under that subsection with respect to the costs,

A if any, ordered to be paid to the applicant, may be made to the Court *ex parte* by notice of application.

(3) Any such certificate must be in Form 170. (emphasis added)

*Orders 45 to 52 provides for execution of judgments and orders and the various modes of execution.

B

Immunity Provision In Section 33(4) Of The GPA – Whether Applicable

[90] However, s. 33(4) of the GPA has the words "and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such". It suggests that it immunises the C persons who are found liable from having to individually make payment.

[91] In my considered view, with respect, the tort committed by the second defendant is not a mere tort of negligence. It is a constitutional tort. He deprived the life of the deceased by beating him up and the deceased was denied prompt medical attention despite a directive from the learned D Magistrate to do so. The life of Balamurugan was taken in breach of his fundamental liberty housed in art. 5 of the Federal Constitution by the second defendant.

[92] In my respectful opinion, in such a circumstance, for the primary E tortfeasor, in this case the second defendant, to be immunised from personal liability to make payment would severely negate the sanctity of the fundamental liberty provision of art. 5 of the Federal Constitution, which is the supreme law of the Federation of Malaysia. Could this be the reason that death-in-custody cases continue unabated? Could this be why persons such as the second defendant dare to act with impunity under the impression that F he would not have to bear personal financial obligations for any judgment obtained against him? And to add to the injustice of it all, as will be made clear in the following paragraphs, if this provision is not construed to deny the second defendant from enjoying such an immunity, it is the very society whom the police is entrusted with the power to look after, that will end up G paying for the heinous misdeed of the second defendant who is a member of the police force.

[93] In my respectful view, the immunity provision in sub-s. 33(4) of the GPA can only be enjoyed by a public officer if he was acting or purporting to act in good faith as prescribed under s. 5 of the GPA (*supra*). Subjecting H the deceased to beatings whilst he was under detention, resulting in the 20 marks of personal injuries collectively found on his body by the two pathologists (*supra*) and which led to his death, surely cannot be done or purporting to be done in good faith. As a result, in my considered view, in the circumstances of this case, the second defendant does not qualify to enjoy I the immunity in sub-s. 33(4) of the GPA.

[94] The principle of there being no immunity without good faith is not unknown in Malaysia. The following illustrations substantiate this:

Judicial Immunity – Qualified By Acting In Good Faith

[95] Even judges and persons acting judicially are liable to be sued if any one of them do has not, in good faith, believe himself to have jurisdiction to do or order the act complained of. See s. 14 of the Courts of Judicature Act 1964 ("CJA"), which provides as follows:

> (1) No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, **provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.**
>
> (2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.
>
> (3) No sheriff, bailiff or other officer of the Court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment, shall be liable to be sued in any civil court in respect of any property seized by him, or in respect of damage caused to any property in effecting, or attempting to effect the seizure, unless it shall appear that he knowingly acted in excess of the authority conferred upon him by the writ, warrant or order in question, and he shall not be deemed to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to the ownership of the property so seized. (emphasis added)

[96] The above s. 14(1) of the CJA was considered in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 CLJ 409. In that case, the Registrar of the High Court at Johor Bahru had issued a circular to licensed auctioneers providing for a fixed sum to be payable in cases of abortive auctions. Abdul Malek Ahmad JCA (later PCA) in delivering the judgment of the court held that the Registrar was not acting judicially in issuing the circular, in which case s. 14(1) of the CJA provides no protection and so the proceedings against the office of the Registrar were held to be in good order.

[97] In the above case and the cases referred to hereinafter, a claim to judicial immunity in Malaysia was held not to be an absolute privilege but to be fact-sensitive. See *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651, where the provisions of s. 14(1) of CJA was canvassed as follows by the Court of Appeal:

[62] Within our shores, judicial immunity is enacted in s. 14(1) which reads:

> No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, **provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.**

[63] In our view, the applicability of the doctrine of judicial immunity under s. 14(1) must be considered in the light of the facts and circumstances prevailing in each particular case, especially conduct which comes within the ambit of the expression "acting judicially".

[64] Section 14(1) was considered in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 CLJ 409 CA. The relevant facts reveal that the registrar of the Johor Bahru High Court had issued a circular to licensed auctioneers. The circular provided for a fixed sum payable in cases of abortive auctions. Abdul Malek Ahmad JCA (later PCA) delivering judgment of the court held that the registrar was not acting judicially in issuing the circular, in which case s. 14(1) provides no protection and so the proceedings against the office of the registrar were held to be in good order.

[65] On the other hand, in *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259 HC, the defendant, judge of the High Court of Sabah and Sarawak, was sued by the plaintiff in respect of an alleged libel contained in the defendant's written judgment delivered in a civil suit in Miri High Court in the discharge of his judicial function as the trial judge. Sulaiman Daud JC (now JCA) invoked s. 14(1) and held that in view of the immunity conferred on a judge thereunder, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset.

[66] In *Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri Malaysia & Or*s [2005] 6 CLJ 550 HC, Jeffrey Tan J had the occasion to consider an equipollent provision contained in s. 10 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("s. 10") which provides, *inter alia*, that every member of the advisory board shall have, in any action or suit brought against him for any act done or omitted to be done in the execution of his duty under the said Ordinance, the like protection and privileges as are by law given to a judge in the execution of his office. Upon a true construction of s. 14(1) and s. 10, the learned judge concluded that immunity is conferred on every member of the advisory board in the circumstances stated therein.

[67] It has been alluded to above that the title to the plaintiff's action and para 2 of the statement of claim against the first defendant show that the first defendant was sued in his capacity as a judge of High Court Malaya.

[68] From the facts in the instant appeal, it was clear that the first defendant was at the material time the judge heading the civil division of the Kuala Lumpur High Court in charge of, *inter alia*, all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area.

[69] In our judgment, judicial immunity conferred by s. 14(1) is wide enough to extend to the discharge of his duties under Art. 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by Art. 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant.

(emphasis added)

Federal And State Officers Appointed Pursuant To The National Land Code (Revised 2020) Act 828 (Formerly National Land Code 1965)

[98] The Federal and State officers appointed for purposes of the administration of the National Land Code (Revised 2020) Act 828 (formerly National Land Code 1965) ("NLC") are not entitled to the benefit of the protection provided under s. 22 of the NLC unless their acts were done or omitted to be done in good faith. Section 22 of the NLC is reproduced hereunder:

No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[99] See the following cases where the courts have consistently held that the protection housed in s. 22 of the NLC was not available to the officers who have failed to abide by the law:

(i) *Pendaftar Hakmilik Negeri Selangor & Ors v. Shaifulizam Mohd Saleh & Anor And Another Appeal* [2020] 5 CLJ 595; [2020] 5 MLJ 1 at paras. [16] and [35] to [39];

(ii) *CIMB Islamic Trustee Bhd v. Pendaftar Hakmilik Negeri Selangor & Ors* [2022] 4 CLJ 499 at para. [57];

(iii) *Hartalega Sdn Bhd & Anor v. Kerajaan Negeri Selangor & Ors* [2022] 7 CLJ 735 at paras. [41], 59 to [61]; [2022] MLJU 1189;

(iv) *Lim Peng Khoon v. Tea Chun Hia & Ors* [2023] CLJU 722; [2023] 1 LNS 722; at paras. [93], [102] to [104].

A **The Universities And University Colleges Act 1971**

[100] Similarly, the Board and the Senate constituted and officers appointed pursuant to the Universities and University Colleges Act 1971 are not entitled to the benefit of the protection provided under this Act unless their acts were done or omitted to be done in good faith. Section 24C of this Act
B provides as follows:

> **Section 24C No action or suit shall be instituted or maintained in any court against -**
>
> (a) the Board;
>
> C (b) a member of the Board;
>
> (c) the Vice-Chancellor;
>
> (d) the Deputy Vice-Chancellors;
>
> (e) the Senate;
>
> D (f) a member of the Senate;
>
> (g) an officer or an employee of the University; and
>
> (h) a person authorized to act for or on behalf of any of the bodies or persons under paragraphs (a) to (g),
>
> E for any act or omission done in good faith in the discharge of its or his powers and duties under this Act in a reasonable belief that it was necessary for the purpose intended to be served thereby.

[101] I made the further order for the further following reasons.

F **Second Defendant Primary Tortfeasor**

[102] At the risk of repetition, it was the second defendant who was the one who had been found by the LTJ to be the primary tortfeasor. This finding was affirmed upon appeal to the Court of Appeal. He was the one who had assaulted and battered Balamurugan whilst he was hapless and under his
G custody with the post-mortem report showing that he had suffered 20 injuries from multiple blunt-force trauma leading to his death.

[103] Although the other individuals were held to be jointly and severally liable the findings of the LTJ pinpointed to the second defendant to be the primary tortfeasor. It ought to be mentioned that it has been held that there
H is a difference between concurrent tortfeasors and joint tortfeasors. See *Jameson And Another v. Central Electricity Generating Board (Babcock Energy, Third Party)* [1999] 1 All ER 193 where Lord Lloyd of Berwick said:

> As to the first question, the starting point is to distinguish between joint torts and concurrent torts. It is agreed between the parties that we are
I here concerned with concurrent torts, and not joint torts; that is to say, the claim against Babcock and the claim against the C.E.G.B. give rise to separate causes of action, each contributing to the same damage.

> It is a matter of every day occurrence in personal injury litigation that a plaintiff will begin an action against two concurrent tortfeasors. He may have a strong case against the first defendant, and a weak case against the second. In those circumstances he may be well advised to accept a payment into court made by the second defendant, and continue against the first.
>
> Thus in *Townsend v. Stone Toms & Partners* [1981] 1 WLR 1153 (a case in contract, but the same principle applies) the plaintiffs brought proceedings against a builder for defective work, and against the architect for negligence in supervising the work. The builder made a payment into court of £30,000 "in satisfaction of all the causes of action in respect of which the plaintiffs claim." It was argued that the claim against the architect should be stayed by virtue of R.S.C., Ord. 22, r. 3(4). The argument was rejected. Eveleigh L.J. said at p. 1161 f: "where there are two separate causes of action, satisfaction of the one should not be a bar to proceedings on the other." So the case against the architect continued.
>
> But when the case came on for trial, it was found as a fact that the £30,000 paid into court was more than sufficient to cover the whole of the loss suffered by the plaintiffs in respect of the overlapping claims. So the plaintiffs' claim against the architect in respect of the overlapping claims was dismissed, and the judge's decision to that effect was upheld by the Court of Appeal in *Townsend v. Stone Toms & Partners (No. 2)* (1984) 27 BLR 26.
>
> So the acceptance by a plaintiff of payment into court by one concurrent tortfeasor does not operate as a bar to proceedings against another.

[104] Thus, in my view, the difference between a concurrent tortfeasor and a joint tortfeasor is in the part played by them in the tort committed. It cannot be gainsaid that the commission of a tort may involve many parts and all who are involved in it leading to the damage suffered by the plaintiff are concurrent tortfeasors and are liable. This explains why the court would apportion liability amongst the concurrent tortfeasors depending on the circumstances, role and degree of their involvement in the tort committed, whereas, those jointly committing a particular act in the tort committed would be joint tortfeasors. As in the *Townsend* case mentioned in *Jameson* (*supra*), the builder and the architect would be concurrent tortfeasors resulting in the negligent works carried out and causing damage to the employer. However, in a case of, for example, an assault by A and B on C at the same time, both A and B would be joint tortfeasors for the assault and battery on C.

Assumption That Awards Of Aggravated And Exemplary Damages Will Act As Sufficient Deterrence Is Not Borne Out

[105] The assumption has been that awards of aggravated and exemplary damages would act as a deterrent. See *Kugan*'s case (*supra*) where His Lordship VT Singham J at para. [86] in handing down an award of aggravated damages said:

> **… it would act as a sufficient deterrence to the defendants, and other officers who seems to have the "cultural habit" of being oppressive and inflicting physical assault on suspects and detainees** and it would cause the officer in charge of arrest, interrogation and investigation and the superiors to take adequate steps necessary to ensure that such oppressive and unconstitutional misconduct offences will be unacceptable and objectionable against those who act irresponsibly or contrary to the public interest so as to send a reminder that they must treat suspects and detainees with the sense of decency and professionally and it is an uncompromising duty. (emphasis added)

[106] However, regretfully, the "cultural habit" identified by His Lordship, VT Singham J continues to be practised as can be seen in this case, with the defendants having the audacity to act in defiance of the learned Magistrate's order to have the detainee sent to the hospital to get medical treatment. The defendants are not getting the message or are choosing to ignore it, a case often described in legal terminology as willful blindness, a concept often used in criminal law, especially in drug cases. In *Sathya Vello v. PP* [2022] 5 CLJ 659 (FC) at para. [23], Justice Abdul Rahman Sebli FCJ (now CJSS) quoted the following from Glanville Williams, the author on the textbook on *Criminal Law* on what amounts to wilful blindness:

> He suspected the fact; he realised its probability; but he refrained from obtaining final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness.

[107] See too the following cases after *Kugan*'s case:

(i) in *Hassan Marsom* (*supra*), Hady, the victim, accompanied his friend to the police station for an investigation regarding a fight. Upon waiting, Hady was brought into the police officer's room and later to another room, where he suffered custodial assault and police brutality. Hady was blindfolded, stripped and assaulted despite his denial of his involvement in the fight. As a result of the assault, Hady was hospitalised for seven days, suffered injuries, complained of shortness of breath and chest pain. Hady was also found later to be not involved with the crime he was accused of. The Federal Court made the following statements:

> [121] Assault in police custody is a clear violation of the most fundamental liberty guaranteed under the Federal Constitution.
>
> Exemplary Damages
>
> [122] While the issue of exemplary damages has not been explicitly covered in the question posed to us, nevertheless we are of the view that premised on the finding of liability for false imprisonment and exacerbated by the unlawful assault while in custody, we must therefore address this issue of exemplary

damages notwithstanding that it may also be just consequential in this case.

[123] In approving the Court of Appeal's decision to award exemplary damages, we cite with approval the sentiments expressed by the learned judges:

> 46. We are also of the unanimous view that this was a proper case for exemplary damages to be awarded *to register the court's disdain of law enforcement officers want only disregarding the rules and procedures that determine the parameters of their duties and responsibilities.* In this case, this had resulted in a serious violation of an individual's dignity and deprivation of his constitutionally guaranteed freedom, what more, by the very same authority who had the duty to protect and safeguard those rights. To overlook and dismiss without adequate remedy this failure on the part of the police force to act within the law, would be to occasion and injustice to the appellant. *The public at large, are also all entitled to be given the assurance that the police force has been forewarned to exercise caution and duly comply with all the requirements of the law before any one is denied their liberty, even only if it was for investigation purposes.* (emphasis added)

(ii) in the case of *Koperal Zainal* (*supra*), Chandran Perumal was the victim. He died of hypertensive heart disease while in police custody. An inquest conducted into his death revealed that the police had acted inhumanely towards him as he had been deliberately deprived of medication essential to his existing medical condition. It was also revealed in the post-mortem examination that the deceased had not eaten any food, had a subgaleal haematoma (scalp bleeding) measuring 10cm by 12cm on the right frontal area of his skull and about seven lesions on his forearm up till his elbow. The learned High Court Judge allowed the plaintiff's claim and granted RM200,000 as exemplary damages, in which the Court of Appeal and Federal Court affirmed.

(iii) in *Shapiei Zainal Abidin* (*supra*), there were three victims, aged 15, 20 and 22, shot to death by the police officers. They were shot in the head and/or chest without any defensive wounds. It was the police's defence that their act of firing at the deceased persons was justifiable and reasonable given the critical situation, where the victims alighted from their car and attacked the police officers with their parang. However, the autopsy reports showed that the victims were not shot from the front but from a downward angle. It was an "execution style" of killing. Although the learned High Court Judge dismissed the plaintiff's claim, however, the Court of Appeal overruled and awarded damages to the estate. RM100,000 was awarded as exemplary damages.

(iv) in *Janagi* (*supra*), the victim, Benedict a/l Thanilas, died of "acute myocardial infarction due to coronary bypass graft disease" and "hypertension, diabetes melitus and stroke". The police officers, upon arresting the victim, were informed by his wife that the victim underwent bypass surgery not long ago and was required to take eight types of medicines a day. However, despite her bringing the medicine to the police station for the victim, the post-mortem examination detected no trace of any medication within the victim's system when he died. The learned High Court Judge found that the police officers had neglected their statutory duties and had committed unlawful omission by not providing the victim with the necessary medication and not affording him the necessary medical attention that he had needed. Thus, other than RM40,000 costs to be paid to the plaintiffs, the following damages was awarded to the estate of the victim:

(a) RM91,800 for loss of support;

(b) RM30,000 for bereavement;

(c) RM4,000 for funeral expenses;

(d) RM50,000 for pain and suffering;

(e) RM100,000 as aggravated damages; and

(f) RM5,500 for the costs of obtaining letters of administration.

[108] Thus, it is timely, for the courts to avail itself of the power it has under para. 1 of the Schedule to s. 25 of the Courts of Judicature Act 1964 to provide a remedy with a similar aim to act as a deterrence to protect what is arguably the most important human right, as per Her Ladyship Nallini Pathmanathan FCJ in *Koperal Zainal* (*infra*).

[109] In my considered view, it would make for a much more potent deterrence if the would-be tortfeasors are made to realise that their own pocket and consequentially or indirectly their rights to the "iron rice bowl" of livelihood in the public service can and would be adversely affected should such a further order be made should they continue to practice the "cultural habit" of committing such a tort in breach of the fundamental liberty housed in the Federal Constitution. Public service is considered to having an "iron rice bowl" because of the guaranteed security of tenure.

Power Under Paragraph 1 Of The Schedule To Section 25 Of The Courts Of Judicature Act 1964 To Make The Further Order

[110] The Federal Court had in its majority decision in *Koperal Zainal* (*supra*) held that the express words of s. 8(2) of the CLA prohibits the award of exemplary damages, and I have dutifully followed this decision in my judgment hereinabove. However, in my considered view, para. 1 of the Schedule to s. 25 of the Courts of Judicature Act 1964 has conferred sufficient powers on the High Court to make this further order.

[111] The extent of the power housed in this provision was explained by Her Ladyship, Nallini Pathmanathan FCJ in her dissenting judgment in *Koperal Zainal* (*supra*) at paras. [102] to [105] which bears reproduction *in extenso*:

> [102] *As such all modern charters of rights, including the FC relating to fundamental rights of the individual, therefore provide for a remedial right for the enforcement of the substantive rights guaranteed under Part II.*
>
> [103] The majority decision in *Nurasmira*, to my mind, with the greatest respect, does not represent the position in law under the FC. I am constrained to depart from the majority decision in *Nurasmira* because there is, in point of fact, a remedy available to be exercised by the Judiciary under para. 1 of the Schedule to s. 25 of the CJA. It provides as follows:
>
> > *Powers to issue to any person or authority direction, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.*
>
> [104] The remedy for the enforcement of chartered or fundamental liberties may be provided for in the written Constitution itself or in the ordinary law. In Malaysia, the remedy is expressly provided for in the CJA, as set out above. Given the existence of a clear remedy it is incumbent on the courts of the country to avail themselves of these remedies and afford redress to individuals or groups who establish an infringement of such fundamental rights such as the right to life.
>
> [105] *Part II of the FC refers to the fundamental liberties of which the right to life under art. 5(1) of the FC, is arguably the most important human right, comprising not only the right to live, but also the right to liberty and a non-exhaustive list of rights, all related to the right to live with human dignity.* (emphasis added)

[112] Over and on top of the Federal Constitution, which the judges of the superior courts have taken the oath to preserve, protect and defend (see art. 124 read with the Oath of Office in the Sixth Schedule of the Federal Constitution), there are further elaborate rules to protect the sanctity of the life and liberty of an individual, a few of which deserves mentioning:

(i) that it has since been recognised that the right to life is so precious that death should not be suffered under the hands of another except in the rarest of rare cases, that the mandatoriness of the imposition of the death penalty for offences which carry the death penalty has been done away with, see the Abolition of Mandatory Death Penalty Act 2023 Act 846 which came into force on 4 July 2023 and for those who have already been sentenced to death, they can apply for their death sentence to be revised and commuted, see the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 Act 847, which came into force on 12 September 2023;

(ii) in cases involving applications for a writ of *habeas corpus* where an individual is claiming he is being detained unlawfully, the High Court will as a rule hear them as a matter of urgency and any appeals will go

straight to the Federal Court by-passing the Court of Appeal with the grounds of judgment of the High Court as a matter of practice to be made available within ten days of the filing of the notice of appeal;

(iii) to deter the extraction of confessions by way of undue influence, the Evidence Act 1950 has provisions which render inadmissible confessions obtained under certain circumstances. Sections 24 and 26 of the Evidence Act 1950 provide:

Confession caused by inducement, threat or promise when irrelevant in criminal proceeding

24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Confession by accused while in custody of police not to be proved against him

26. (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Sessions Court Judge or Magistrate, shall be proved as against that person.

(iv) in fact, the Penal Code makes it a crime for a police officer to cause hurt to extort confessions or to wrongfully confine a person. Sections 330, 331 and 348 of the Penal Code provide as follows:

Section 330 Voluntarily causing hurt to extort confession or to compel restoration of property

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

ILLUSTRATIONS

(a) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a revenue officer, tortures Z in order to compel him to confess to a pretended offence against the excise laws. A is guilty of an offence under this section.

Voluntarily causing grievous hurt to extort confession or to compel restoration of property

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Wrongful confinement for the purpose of extorting confession or of compelling restoration of property

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct; or for the purpose of constraining the person confined, or any person interested in the person confined, to restore, or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

(v) as a safeguard, a confession can only be admitted as evidence if a caution was administered to the accused/suspect prior to the recording of the confession. This is provided for in, amongst others, s. 37BA of Dangerous Drugs Act 1952, which is reproduced below:

Section 37B. Admission of statement in evidence.

(1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to him by any other

police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid -

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect -

It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

(vi) police officers are expressly enjoined to protect life, and to guard the prisoners. See s. 20 of the Police Act 1967 (Revised 1988) Act 344 (*supra*);

(vii) the rights of detainees are expressly spelt out under the Lockup Rules 1953 made pursuant to the Prisons Ordinance (No. 81 of 1952), which safeguards the privileges of a prisoner. The following are some of them:

Rules

23. A prisoner may be allowed visits by his advocate, including any representative of such advocate as such advocate considers necessary for the preparation of his defence or appeal. The Officer-in-Charge or the Deputy-Officer-in-Charge may take such action as he considers necessary to establish the identity of any person claiming to be an advocate or his representative.

33. No prisoner shall be placed in a mechanical restraint as a punishment.

35(1). The Officer-in-Charge or the Deputy-Officer-in-Charge shall frequently and never less than once a day inspect all parts of each lockup and shall see every prisoner confined therein at least once in every twenty- four hours and shall visit each lockup at an uncertain hour of the night at least once in every seven days.

35(2). A police officer shall be detailed daily by the Officer-in-Charge to visit cells at least once each night to see that they are secure and to check the number of prisoners.

36. The Officer-in-Charge or the Deputy-Officer-in-Charge shall without delay report to the Medical Officer any case of apparent mental disorder or of injury to or illness of any prisoner.

37. The Officer-in-Charge or the Deputy-Officer-in-Charge shall upon the dangerous illness or death of any prisoner give immediate notice thereof to the most accessible known relative of such prisoner

38. The Medical Officer shall visit each lockup whenever requested to do so by the Officer-in-Charge, and he shall enter in the Journal his comments on the state of the lockup and the prisoners confined therein.

39. The Medical Officer shall notify the Officer-in-Charge of any prisoner who appears to him to be mentally disordered or of unsound mind.

40. Whenever the Medical Officer is of the opinion that the life of any prisoner will be in danger by his continued confinement in a lockup or that any prisoner is totally and permanently unfit for confinement, he shall immediately state his opinion and the grounds thereof in writing to the Officer-in-Charge, who shall forthwith forward the same to the President of a Sessions Court or to a First Class Magistrate for transmission to the Menteri Besar of the State or to the Resident Commissioner of the Settlement, as the case may be.

41. The Medical Officer shall whenever he visits a lockup to examine the food supplied to prisoners and shall enter in the Journal his comments thereon.

42. Subordinate police officers and constables shall at all times be responsible for the safe custody of prisoners under their charge and shall count the prisoners frequently and always -

(a) on receiving charge;

(b) on handing over charge; and

(c) on leaving any building or work,

and shall enter the muster in the Journal and shall sign the same.

44. No police officer shall converse unnecessarily with any prisoner, or by word, gesture or demeanour act in such a manner as may tend to annoy a prisoner.

45. Except in cases of imperative necessity, no police officer shall enter the cell of a prisoner at night, unless he be accompanied by another police officer.

46. No police officer shall strike or apply physical force to a prisoner unless compelled to do so in self-defence or in defence of another person.

(viii) the Prison Regulations 2000 on the other hand also provides a list of regulations to safeguard the welfare of each prisoner who are sentenced to imprisonment.

[113] From the aforesaid, it can be clearly seen that there are elaborate law, rules and regulations in place to protect and safeguard the rights and welfare of detainees as part of the safeguards to protect and preserve the sanctity of life even when a person is detained on suspicion of having committed a crime. Yet, they were breached with impunity in this yet another death-in-custody case. It is thus clear that the second defendant had not acted in good faith or purported to act in good faith.

Article 8 Of The Federal Constitution

[114] In my considered view, in the circumstances of this case, to allow the second defendant in his capacity as a police officer an immunity would be a travesty of justice and a violation of the fundamental liberty of equality housed in art. 8 of the Federal Constitution. To hold otherwise would amount to giving a *carte blanche* or blanket protection to those who engage in such a "cultural habit" as identified in *Kugan*'s case (*supra*). For the defendants to be allowed to conflate the enjoyment of such immunity with the concept of vicarious liability is in my considered view, misconceived and would be unconstitutional.

Cultural Habit Condoned?

[115] On the facts of this case, I cannot help but observe that it would seem that the "cultural habit" is seemingly condoned because there is not an iota of evidence presented by learned Senior Federal Counsel from the Attorney General Chambers that any charges have been preferred against any of the individual defendants, in particular, the second defendant, unlike the case of *Marry Susay* (*supra*) where the police officer assailant was charged for the murder of the detainee but was acquitted for lack of proof. Another example would be the successful prosecution leading to the conviction of two police officers for the sensational murder of a Mongolian national, Altantuya Shaariibuhu, see *PP v. Azilah Hadri & Ors* [2012] 1 CLJ 358; [2012] 8 MLJ 222 – at the High Court, both the accused police officers were convicted and sentenced to be hung by the neck until they are dead; *Azilah Hadri & Anor v. PP* [2013] 7 CLJ 577 – upon appeal to the Court of Appeal, their

convictions were set aside and both police officers acquitted and discharged, *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617 – at the Federal Court, the decision of the Court of Appeal was set aside and the decision of the High Court restored and affirmed. It would add depth and substance to the fundamental human right of equal protection housed in art. 8 of the Federal Constitution should equal prosecution of those committing crimes are initiated.

Doctrine Of Analogy By Statute

[116] That satisfaction is to be first had against the principal debtor is not a new concept. By way of statutory analogy, this can be seen in the provision of ss. 5(3) and 5(4) of the Insolvency Act 1967 Act 360 which provides as follows:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action -
>
> (a) against a social guarantor; and
>
> (b) against a guarantor other than a social guarantor unless the petitioning creditor has obtained leave from the court.
>
> (4) *Before granting leave referred to in paragraph (3)(b), the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor.* (emphasis added)

Order 92 Rule 4 Of The Rules Of Court 2012 And Consequential Order

[117] If at all necessary, this court invokes its inherent powers under O. 92 r. 4 to make this further order to prevent injustice. Order 92 r. 4 of the Rules of Court 2012 provides that:

> **4. Inherent powers of the Court (O. 92 r. 4)**
>
> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[118] The injustice takes the following form. The second defendant is a member of the police force whose primary duty as far as the public is concerned is to maintain law and order. Instead, he has broken the very law that he was and is entrusted and empowered to enforce. His remuneration is funded with resources paid for by the public whom he is to protect. It is totally objectionable, and abhorrent to any reasonable man's sense of justice that the public ought to contribute to the funds to satisfy a judgment against the second defendant, who is found primarily responsible to have broken the law by beating up a member of the public leading to his death, a person whom he (the second defendant) was remunerated and tasked to protect.

A **Public's Money**

[119] A troll through the law reports would show that in reflecting the court's abhorrence of the wrongdoing by those empowered by the Government or State or in the words of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 of "oppressive, arbitrary or unconstitutional action by the
B servants of Government" an award of exemplary damages is made. In certain circumstances where an award of exemplary damages cannot be made, the court makes an award of aggravated damages, see *Koperal Zainal Mohd Ali* (*supra*).

C **[120]** However, herein lies the irony. Whilst it is well and good that the court shows its abhorrence of the wrongdoing by those empowered by the Government by making an award of exemplary or aggravated damages against the defendants, including the Government of Malaysia, the damages is going to be satisfied with the public's money *ie*, the money of the public whose interest these wrongdoers were supposed to look after in the first
D place. It offends the concept of fairness, reasonableness and justice. In my considered view, the further order will serve as a more just and effective deterrent to prevent the repeat of such brutal acts being perpetrated in breach of the fundamental constitutional right to life by those thinking that any personal liability of theirs will be paid for by the Government.

E **[121]** Margaret Thatcher, the former Prime Minister of the United Kingdom, said a fundamental truth when addressing the Conservative Party Conference in 1983* when she said:

> *Let us never forget this fundamental truth. The State has no source of money other*
F *than the money people earn themselves. If the State wishes to spend more, it can do so only by borrowing your savings or by taxing you more. And it's no good thinking that someone else will pay [because] that someone else is you. There is no such thing as public money – there is only taxpayers money.*
>
> * https://www.aei.org/carpe-diem/tribute-to-margaret-thatcher/
>
> (emphasis added)

G **[122]** Consistent with the aforesaid fundamental truth is the further irony that the higher the abhorrence is shown by the courts in the form of a higher award of damages, the bigger would be the amount the public is being asked to pay – to pay for the misdeeds and wrongdoings of the servants of the
H Government. And, the High Court at Shah Alam found two police officers, a political analyst and the Government of Malaysia jointly and severally liable to pay general, aggravated and exemplary damages in a combined sum of RM5,000,000, interest thereon at 5% from the date of the filing of the suit in 2007 until full settlement, and costs of RM25,000 for the unlawful killing of a Mongolian citizen, Altantuya Shaariibuu (see High Court at Shah Alam
I Civil Suit No. 21-120-2007 judgment dated 16 December 2022 which is pending appeal in the Court of Appeal). It would most probably beggar belief and distress the sense of justice of the man on the street that he will be

contributing towards the payment of damages ordered to be paid by the very person entrusted to protect him and who have been found liable for abusing such a power.

[123] This fundamental truth was made mention in *Lucknow Development Authority v. MK Gupta* AIR 1994 Supreme Court 787; [1994] SCC (1) 243. In succinct language, KM Joseph J in *Vibin PV v. State Of Kerala* (HC) at para. 39 said:

> In *Lucknow Development Authority v. M.K.Guptha* [1994] (1) SCC 243, *the Supreme Court observed that when the court directs payment of damages or compensation against State, the ultimate sufferer is the common man. It is the taxpayers' money, which is paid for action of those who are entrusted under the Act to discharge their duties in accordance with law.* We are inclined to keep this reality in our mind also. Therefore, we make it clear that it will be open to the Government to recover the amount, which is directed to be paid immediately by the first respondent, from respondents 5 to 7, after due enquiry and investigation. (emphasis added)

[124] The facts in *Vibin PV* (*supra*) tell of a case of a young lawyer aged 25 who hails from a poor family of a backward community and who, whilst returning home one day on his motorcycle, was intercepted by a police squad on police duty. He was cane charged brutally and in the assault, he lost five teeth. The court held that:

> We find that the petitioner is entitled to get compensation from the first respondent/State for the infringement of his right to life and personal liberty at the hands of the respondents 5 to 7.
>
> Compensation: An order of payment of compensation would amount to enforcement of the rights that had been contravened. It is clearly a form of redress and it will be the only practicable form of redress. The enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.
>
> 38. Lastly, what is the quantum of compensation? We feel that when considering quantum of compensation, his status, as a lawyer also having some relevancy, particularly when the act done by the respondents infringed his right to practice, his profession at least for a short period. Moreover permanent damages caused on the face of the petitioner is not denied by the respondents, and he is aged only 25. Replacement of 5 teeth is an expensive treatment also. None of the respondent disputed the life background of the petitioner. The victims who suffered physical as well as mental injury and pains at the hands of the Government servants due to abuse of power is entitled to get exemplary damages. Exemplary damages need not be calculated with reference to actual monetary loss suffered by the victim. **Public functionaries particularly police which is entrusted with protection of the people can never be violator of law and order.**

A 39 (*supra*).

> 40. Considering entire facts and circumstances of the case, we feel that an award of compensation of Rs.50,000/-, the relief which is prayed for, is just and proper to meet the ends of justice. We direct the first respondent to pay a compensation of Rs.50,000/- (Rupees fifty thousand only) to the petitioner within one month from the date of the judgment.
>
> (emphasis added)

Judicial Dynamism Or Activism

[125] There may be quarters who would take up arms against the further order on the basis that this amount to judicial activism, that it amounts to judicial legislation. With respect, in my considered view, I am not legislating. Instead, what I have done is to interpret the law and, in the process, pay heed to the principles of justice within the legal and constitutional framework.

[126] On judicial activism, Datuk Seri Hishamudin Yunus, an eminent jurist who retired as a Court of Appeal Judge had occasion to say in an interview with The Edge issue 13 March 2023* that:

> The Edge: Chief Justice Tun Tengku Maimun Tuan Mat had said last September during the reference on former Lord President Allahyarham Tun Salleh Abas, that judges must be faithful to the Federal Constitution and uphold the rule of law. What are the challenges faced by today's judges when sitting on the bench for such cases?
>
> Datuk Seri Hishamudin Yunus: I would say the need for judges to be courageous and to embrace judicial activism is one of the challenges. *To explain in simple terms, 'judicial activism' is a term that describes a judicial decision that is creative, that breathes life into the law; a decision that involves inductive reasoning, that is positive and takes into account the social needs of the time, whilst at the same time paying heed to the principles of justice and the legal and constitutional framework within which that decision is made.*
>
> Although the term 'judicial activism' is relatively new, the truth is that judges have been making decisions that manifest judicial activism for a long time - even before the celebrated US Supreme Court case of *Marbury v. Madison*. Indeed, I would say judicial activism is as old as the common law.**
>
> * https://theedgemalaysia.com/node/658663
>
> ** *Judicial Activism - The Way to Go?* [2012] 6 MLJ xvii by Dato' Mohd Hishamudin Yunus JCA (as he then was)
>
> (emphasis added)

[127] On the other hand, it has been described by a different label, that of "judicial dynamism" – a distinction made clear by Justice Hamid Sultan JCA who in His Lordship's dissenting judgment in *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911; [2016] 4 MLJ 455 said:

> [92] … *Judicial Dynamism' is expected of judges in a country with a written constitution to protect fundamental rights within the constitutional framework; more so when they have taken an oath to preserve, protect and defend the constitution. What is shunned in England as judicial activism is a constitutional obligation for judges here to meet the legitimate public expectation as per the constitution.*
>
> [93] A large majority of jurists here and elsewhere have not taken note of the difference in the oath of office under the constitution when they criticise judicial dynamism as judicial activism. (emphasis added)

Other Jurisdictions

[128] In India, see *Lucknow Development Authority* (*supra*) and *Vibin PV* (*supra*), the court makes an award of compensation with an added order that the State is to secure contribution from the tortfeasors.

[129] In Canada, there is the Supreme Court authority of *Roncarelli v. Duplessis* [1959] SCR 121, where the plaintiff, the proprietor of a restaurant in Montreal, successfully sued and obtained a judgment for damages against the individual defendant who, without legal powers in the matter, had given orders to the Quebec Liquor Commission to cancel the plaintiff's licence to sell intoxicating liquor.

[130] In England, the provisions of sub-s. 25(4) of the Crown Proceedings Act 1947 is similar to our sub-s. 33(4) of the GPA. The usual course is for the State to pay and then claim contribution or indemnity from the public servant, see also *Wade and Forsyth Admin Law,* 12th edn Chap. 21. Subsection 25(4) of the Crown Proceedings Act 1947 reads:

> 25 Satisfaction of orders against the Crown.
>
> (4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.

[131] In the United States of America, the article written by the learned author Thomas A Eaton from the School of Law, University of Georgia on the *"Foreword: Symposium Re-Examining First Principles: Deterrence and Corrective Justice in Constitutional Torts"* 35 GA L Rev 837 (2001) ends with the following conclusion, which resonates well with this court.

> It is fitting that this Symposium concludes with the comments of Professor Marshall Shapo. It was Professor Shapo's scholarship that carved out constitutional torts as a distinct subject of academic inquiry more than thirty-five years ago. His observations today remind us that whether viewed through the lens of moral philosophy or economic theory, claims seeking redress for violations of constitutional rights are, and always have been, a species of tort. Thus, when re-examining first principles, we are inevitably informed and influenced by developments in

this traditional first-year common law subject. Yet, Shapo puts his insightful finger on the distinctive feature of constitutional torts that makes it worthy of independent study: a governmental official inflicting indignities on a citizen who cannot defend herself, let alone retaliate. The constitutional tort provides a legal kicker in this type of case, precisely because of the relation of power – monopoly power, in fact – and vulnerability.

As long as governments and their officials have the potential to abuse power, there will be a need for a constitutional tort remedy. As long as there remains a need for that remedy, periodic re-examinations of first principles, such as that contained in this Symposium, will invite scholars and jurists alike to think seriously whether the law is achieving its stated purposes. (emphasis added)

[132] It is thus, timely, to re-examine the first principles on whether the immunity housed in sub-s. 33(4) of the GPA should be allowed to be enjoyed by a governmental official who is guilty of a constitutional tort. The governmental official in this case is the second defendant and the constitutional tort he had committed is to beat up the detainee in his unlawful efforts to extract a confession for an alleged crime leading to the deprivation of the life of the detainee, a fundamental liberty guaranteed by the Federal Constitution.

[133] For the reasons I have given, in summary, I find that the second defendant should not be entitled to the immunity against personal liability to pay the judgment debt because:

(i) the immunity is only available to a personal individual who had acted in good faith or purporting to act in good faith and on both counts, he had not;

(ii) in the circumstances of this case, to allow him the immunity would be unconstitutional as it is an affront to the fundamental right to life and personal liberty guaranteed by art. 5 of the Federal Constitution;

(iii) it would be wholly unjust on the facts of this case that the public whom the second defendant is to protect be made to pay for the heinous misconduct of the second defendant.

Interest

[134] Pursuant to s. 11 of the CLA and O. 42 r. 12 of the Rules of Court 2012, I award interest at 5% pa on the special, general and aggravated damages from 19 February 2020 (date of filing of writ) until one day before the date of judgment that is 29 May 2024 and interest at 5% pa on the judgment debt from the date of judgment until full realisation.

Conclusion

[135] Wherefore, having assessed the damages, I made the following decision in favour of the plaintiffs. Subject to para. (vi) below, the defendants are to jointly and severally pay the plaintiffs the following:

(i) special damages in the sum of RM16,000;

(ii) general damages of RM100,000;

(iii) aggravated damages of RM200,000;

(iv) costs of RM22,000 together with interest thereon at 5% pa from the date of judgment until full payment;

(v) interest at 5% pa on the special, general and aggravated damages from 19 February 2020 (date of filing of writ) until one day before the date of judgment that is 29 May 2024 and interest at 5% pa on the judgment debt from the date of judgment until full realisation; and

(vi) the plaintiffs are to first seek to secure satisfaction of the judgment debt in whole or in part from the second defendant before seeking to secure satisfaction of the balance judgment debt in whole or in part from the other judgment debtors.